

STATEMENT OF EMERGENCY  
401 KAR 5:074E

(1) KRS 224.10-100 requires the Natural Resources and Environmental Protection Cabinet to promulgate administrative regulations as are reasonably necessary to issue, continue in effect, remove, modify, suspend, or deny permits for the discharges into waters of the Commonwealth and permits for the installation, alteration, expansion, and operation of any sewage system. In addition, KRS 224.10-100 provides for the prevention of air pollution.

(2) An ordinary administrative regulation is not sufficient and an emergency exists of an imminent threat to the public health and welfare. Changes in the beef, dairy, poultry, and pork industries have brought a heightened federal interest in concentrated animal feeding operations nationwide. This has created an urgent need to update the federally delegated Kentucky Pollutant Discharge Elimination System (KPDES) permitting program. In addition, the United States Environmental Protection Agency has published a draft administrative regulation governing concentrated animal feeding operations in the *Federal Register*, and is under a federal consent decree to finalize that administrative regulation. Therefore, in order to protect human health and the environment, an emergency administrative regulation must be placed into effect immediately. This emergency administrative regulation explains the federally required interpretation of the KPDES program, and establishes permitting conditions for beef, dairy, poultry, and swine concentrated animal feeding operations. This emergency administrative regulation will protect human health and the environment.

(3) This emergency administrative regulation will be replaced by an ordinary administrative regulation. The Notice of Intent for 401 KAR 5:074 will be filed with the Regulations Compiler with this emergency administrative regulation.

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PAUL E. PATTON, Governor  
Commonwealth of Kentucky

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Date

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JAMES E. BICKFORD, Secretary  
Natural Resources and Environmental Protection Cabinet

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Date

1 NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET

2 Department for Environmental Protection

3 Division of Water

4 (New Administrative Regulation)

5 401 KAR 5:074E. KPDES permit conditions for beef, dairy, poultry, and swine concentrated  
6 animal feeding operations.

7 RELATES TO: KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110,  
8 224.20-120, 224.70-100, 224.70-110, 33 U.S.C. 1342

9 STATUTORY AUTHORITY: KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110, 33  
10 U.S.C. 1342

11 NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 authorizes the  
12 Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke,  
13 modify, suspend or deny under such conditions as the cabinet may prescribe permits to discharge  
14 into any waters of the Commonwealth. KRS 224.16-050 further empowers the cabinet to issue  
15 federal permits pursuant to 33 U.S.C. Section 1342(b) of the Federal Water Pollution Control  
16 Act. KRS 224.20-110 authorizes the cabinet to regulate the emission or discharge of air  
17 contaminants into the air under the jurisdiction of the Commonwealth. This administrative  
18 regulation establishes certain conditions applicable to KPDES permits for beef, dairy, poultry, and  
19 swine concentrated animal feeding operations.

20 Section 1. Applicability. This administrative regulation establishes KPDES permit

conditions for beef, dairy, poultry, and swine concentrated animal feeding operations.

Section 2. Operators of Concentrated Animal Feeding Operations. (1) A person who exercises substantial operational control over a concentrated animal feeding operation shall be considered an operator of the concentrated animal feeding operation. A person exercises substantial operational control if the person:

(a) Directs the activities of persons working at the concentrated animal feeding operation either through a contract, or direct supervision of, or on-site participation in, activities at the concentrated animal feeding operation;

(b) Owns all, or a significant percentage of, the animals; or

(c) Specifies how the animals are grown, fed, or medicated.

(2) An operator of a concentrated animal feeding operation shall apply for a KPDES permit and comply with its conditions. The operator may apply for the KPDES permit alone or together as a co-permittee with the owner of the concentrated animal feeding operation.

Section 3. Best Management Practices. (1) A livestock barn, poultry house, lagoon, or land application area constructed or expanded after February 14, 2000 shall not be located in:

(a) A state or national park, state or national forest, or nature preserve; or

(b) A wellhead protection area approved by the cabinet pursuant to 401 KAR 4:220.

(2) A livestock barn, poultry house, or lagoon constructed or expanded after February 14, 2000 shall not be located in:

(a) A 100-year floodplain unless permitted pursuant to 401 KAR 4:060;

(b) A jurisdictional wetland as determined by the Natural Resources Conservation Service;

or

(c) A sinkhole or other enclosed depression where subsidence is evident.

(3) The setback requirements established by this subsection shall apply as follows:

(a) A barn, lagoon, poultry house, litter storage structure, composting site, or waste handling structure constructed or expanded after February 14, 2000 at a concentrated animal feeding operation;

(b) A barn, lagoon, poultry house, litter storage structure, or composting site constructed or expanded after February 14, 2000 at an animal feeding operation, if the construction or expansion will cause the animal feeding operation to become a concentrated animal feeding operation; and

(c) Land application of waste at a concentrated animal feeding operation.

#### BEEF SITING CRITERIA

SETBACK FEATURE <sub>3</sub>	BARN, LAGOON	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, school yard, business, other structure to which the general public has access, park <sub>4</sub>	1,500 feet	500 feet	1,000 feet
Incorporated city limit <sub>4,5</sub>	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant <sub>4</sub>	300 feet	150 feet	150 feet
Downstream <sub>1</sub> water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water <sub>2</sub>	1 mile	750 feet	1,500 feet
Downstream <sub>1</sub> public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet
<sub>1</sub> Measured along gradient			
<sub>2</sub> Designated outstanding state resource waters are listed in 401 KAR 5:026			
<sub>3</sub> Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the			

setback feature
<sup>4</sup> Existing at the time the first KPDES permit is issued
<sup>5</sup> For existing operations, land application setbacks do not apply

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### DAIRY SITING CRITERIA

SETBACK FEATURE <sup>3</sup>	BARN, LAGOON	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park <sup>4</sup>	1,500 feet	500 feet	1,000 feet
Incorporated city limit <sup>4,5</sup>	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant <sup>4</sup>	300 feet	150 feet	150 feet
Downstream <sup>1</sup> water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water <sup>2</sup>	1 mile	750 feet	1,500 feet
Downstream <sup>1</sup> public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet
<sup>1</sup> Measured along gradient <sup>2</sup> Designated outstanding state resource waters are listed in 401 KAR 5:026 <sup>3</sup> Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the setback feature <sup>4</sup> Existing at the time the first KPDES permit is issued <sup>5</sup> For existing operations, land application setbacks do not apply			

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### POULTRY SITING CRITERIA

SETBACK FEATURE <sup>3</sup>	POULTRY HOUSES, LITTER STORAGE, OR COMPOSTING SITE	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park <sup>4</sup>	1,500 feet	300 feet	300 feet

Incorporated city limit <sub>4,5</sub>	2,000 feet	1,000 feet	1,500 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	75 feet
Water well not owned by applicant <sub>4</sub>	300 feet	200 feet	200 feet
Downstream <sub>1</sub> water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water <sub>2</sub>	1 mile	500 feet	500 feet
Downstream <sub>1</sub> public water supply surface water intake	1 mile	500 feet	500 feet
Roadways, primary (state and federal)	150 feet	75 feet	75 feet
Roadways, secondary (county)	100 feet	75 feet	75 feet
<sub>1</sub> Measured along gradient <sub>2</sub> Designated outstanding state resource waters are listed in 401 KAR 5:026 <sub>3</sub> Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the setback feature <sub>4</sub> Existing at the time the first KPDES permit is issued <sub>5</sub> For existing operations, land application setbacks do not apply			

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#### SWINE SITING CRITERIA

SETBACK FEATURE <sub>3</sub>	BARN, LAGOON	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, school yard, business, other structure to which the general public has access, park <sub>4</sub>	1,500 feet	500 feet	1,000 feet
Incorporated city limit <sub>4,5</sub>	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant <sub>4</sub>	300 feet	150 feet	150 feet
Downstream <sub>1</sub> water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water <sub>2</sub>	1 mile	750 feet	1,500 feet
Downstream <sub>1</sub> public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet
<sub>1</sub> Measured along gradient			

<p><sup>2</sup>Designated outstanding state resource waters are listed in 401 KAR 5:026</p> <p><sup>3</sup>Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the setback feature</p> <p><sup>4</sup>Existing at the time the first KPDES permit is issued</p> <p><sup>5</sup>For existing operations, land application setbacks do not apply</p>
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1           (d) The cabinet may grant a variance from the setbacks in this section for a dwelling or  
2 church not owned by the applicant, if the applicant obtains from the owner of the property in  
3 question an easement, properly filed of record, granting the applicant a permanent exemption  
4 from the distance requirements in this administrative regulation. A certified copy of this easement  
5 shall be submitted to the cabinet with the permit application.

6           (4)(a)Poultry concentrated animal feeding operations shall provide permanent litter storage  
7 structures by October, 2001.

8           (b) The requirements of subsection (3) of this section shall not apply to the siting of  
9 permanent litter storage structures on poultry concentrated animal feeding operations in existence  
10 prior to February 14, 2000.

401 KAR 5:074E Approved for promulgation:

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James E. Bickford, Secretary  
Natural Resources and Environmental Protection Cabinet

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Date



## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation #: 401 KAR 5:074E  
Contact person: Jack A. Wilson, Director  
Division of Water  
14 Reilly Road  
Frankfort, Kentucky 40601  
Phone: (502) 564 – 3410  
Fax: (502) 564 - 0111

- (1) Provide a brief summary of:
  - (a) What this administrative regulation does: This administrative regulation establishes certain conditions applicable to KPDES permits for beef, dairy, poultry and swine concentrated animal feeding operations.
  - (b) The necessity of this administrative regulation: This administrative regulation is necessary to regulate the operations of beef, dairy, poultry and swine concentrated animals feeding operations for the purpose of protecting the air quality and water quality of the Commonwealth, as well as public health.
  - (c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110, and 33 U.S.C. 1342, by establishing certain conditions applicable to KPDES permits for beef, dairy, poultry and swine concentrated animals feeding operations.
  - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation establishes certain conditions applicable to KPDES permits for beef, dairy, poultry and swine concentrated animal feeding operations.
- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
  - (a) How the amendment will change this existing administrative regulation: This administrative regulation is not an amendment.
  - (b) Necessity of the amendment to this administrative regulation: This administrative regulation is not an amendment.
  - (c) How the amendment conforms to the content of the authorizing statutes: This administrative regulation is not an amendment.
  - (d) How the amendment will assist in the effective administration of the statutes: This administrative regulation is not an amendment.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation will apply only to beef, dairy, poultry, and swine animal feeding operations defined in 401 KAR 5:002. It is currently estimated that there are:  
  
Beef: 6 operations with more than 1000 animal units (2 greater than 1500 animal units)  
Dairy: 4 operations with more than 1000 animal units (1 greater than 1500 animal units)

Poultry: 176 operations with more than 1000 animal units (54 greater than 1500 animal units)  
Swine: 64 operations with more than 1000 animal units (41 greater than 1500 animal units)  
Total: 250 operations (98 of which have more than 1500 animal units)

It should be noted that even if an operation has more than the requisite number of animals to qualify as a CAFO, it does not automatically designate the operation as a CAFO. Most beef operations in Kentucky, for example, are grazing operations rather than confined feedlot operations.

- (4) Provide an assessment of how the above group or groups will be impacted by either the implementation of this administrative regulation, if new, or by the change if it is an amendment: There will be an increase in the cost of doing business in the agricultural sector if an beef, dairy, poultry or swine operation meets the definition of a concentrated animal feeding operation (CAFO) per 401 KAR 5:002. For existing operations, meeting the CAFO definition, there may be an increase in land costs, waste storage/handling, and a minimal administrative cost.

Initial siting of new or expanding operations will be a key aspect related to compliance with the regulation. However, the average farm in Kentucky is 149 acres (91,000 farms total – according to Kentucky Agricultural Statistics Services), and this is sufficient to meet setback requirements in most instances, dependent upon the placement of buildings.

For poultry operations that are defined as a CAFO, permanent litter storage structures will be required. This requirement to install such structures is consistent with the requirements of the Agriculture Water Quality Plan. As a result, the increase in costs to poultry producers is negligible as a result of this regulation. Otherwise, cost increases would be estimated at \$20,000 to \$30,000 for each litter storage structure for an estimated 176 producers. This would equate to a \$3.5 to \$5 million investment (the value could be significantly less depending upon the number of actual poultry CAFOs). During fiscal year 2000 alone, over \$3.6 million in cost share dollars was awarded for the construction of 188 litter storage structures for both CAFO and smaller non-CAFO poultry operations. It should be noted that, in addition to protecting the environment, benefits of such structures would include retention of litter nutrient value and easing litter handling and poultry house cleanout. Cost share dollars, available to producers, will reduce some of the economic burden imposed by the Agriculture Water Quality Plan and this administrative regulation.

Finally, there could be additional costs to operators as they share responsibility for complying with permit conditions. Distribution of costs will be case by case as permit holders develop respective responsibilities. The range of options extends from complete control of operation by operator, to complete control of operation by owner.

- (5) Provide an estimate of how much it will cost to implement this administrative regulation:

- (a) Initially: There will be an increase in costs to the administering agency in order to implement the permitting program for CAFO operations. This includes the issuance of an estimated 250 KPDES permits to existing operations. All or expanding CAFOs would need to be permitted as well. The agency estimates that one person-year would be dedicated to permitting of CAFOs. A typical person-year cost would be \$63,341 per year.

In addition, enforcement/compliance costs would increase due to the need to inspect each CAFO operation. The administering agency estimates that an additional person-year would be necessary for CAFO oversight, with an additional three person-years necessary for AFO and Agriculture Water Quality Plan oversight. At a typical person-year cost of \$63,341 per year, this would equate to \$253,364 per year.

- (b) On a continuing basis: KPDES permits are typically issued/re-issued on a 5-year cycle. In addition, new and/or expanding CAFOs would need to be permitted as well. Enforcement/compliance activities would similarly be conducted throughout the life of the operation. The above person-year estimates take into account continuing or ongoing costs.
- (6) What is the source of funding to be used for the implementation and enforcement of this administrative regulation: The funds to support the implementation and enforcement of this administrative regulation will come from a combination of federal sources (Clean Water Act Section 106 funds) and state funds.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: An increase in funding will be necessary to implement this administrative regulation (see above estimate of costs). This increase in funding will be solicited through Clean Water Act Section 106 funds. There will be no increase in permit fees.
- (8) Statement of whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: Fees for CAFOs are already set by KRS 224.70-120.
- (9) TIERING: Is tiering applied? (Explain why tiering was or was not used.) Tiering is applied. Smaller producers, who are thought to have less of an impact on public health and the environment, are not affected by this emergency regulation, unless they expand their operation to the size of a CAFO. In addition, the administrative regulation applies only to beef, dairy, poultry and swine CAFOs

## FEDERAL MANDATE ANALYSIS COMPARISON

**Administrative Regulation #:** 401 KAR 5:074E

**Contact person:** Jack A. Wilson

1. **Federal statute or regulation constituting the federal mandate.** 33 U.S.C. 1342.
2. **State compliance standards.** KRS 224.10-100, KRS 224.16-050, KRS 224.16-060, KRS 224-20-100, KRS 224.20-110, KRS 224.20-120, KRS 224.70-100, KRS 224.70-110.
3. **Minimum or uniform standards contained in the federal mandate.** 33 U.S.C. 1342 establishes conditions for states to administer National Pollutant Discharge Elimination System (NPDES) permit programs.
4. **Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate?** No
5. **Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.** This administrative regulation does not impose a stricter standard, or additional or different responsibilities or requirements.

## FISCAL NOTE ON LOCAL GOVERNMENT

**Administrative Regulation #:** 401 KAR 5:074E

**Contact person:** Jack A. Wilson

New   X  

Amendment       

- 1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government?**

Yes       

No   X  

- 2. State what unit, part or division of local government this administrative regulation will affect.** This administrative regulation will not affect any unit, part, or division of local government.

- 3. State the aspect or service of local government to which this administrative regulation relates.** This administrative regulation does not relate to local government.

- 4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the administrative regulation is to be in effect. If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.**

**Revenues (+/-):** There is no anticipated effect on current revenues.

**Expenditures (+/-):** There is no anticipated effect on current revenues.

**Other Explanation:** None.